LIBRARY
SUPREME COURT, U. S.

FILED
MAR 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1201

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

vs.

GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS

RICHARD M. FREEMAN,
ZEV STEIGER,
400 West Madison Street,
Chicago, Illinois 60606,
Attorneys for Petitioners.

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1201

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Petitioners,

vs.

GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS

Petitioners submit this brief in reply to the arguments first raised in the brief for Respondents in opposition to the petition, as authorized by Rule 24.4.

I

THE SIGNIFICANCE OF WHETHER PETITIONERS DID NOT VOLUNTARILY EXTEND CREDIT FOR PER DIEM

Respondents have failed to fully appreciate the significance (to the decisions below and to the petition) of the question whether Petitioners voluntarily extended credit for per diem, for

they suggest (Resp. pp. 8-9) that Petitioners' right to payment, setoff or other relief before the Reorganization Court depends on whether the amounts owing for per diem are held in trust, and not upon whether Petitioners voluntarily extended credit for such amounts.

The opinion of the Reorganization Court is premised on the holding that credit was voluntarily extended; therefore, the Court reasons, "equitable principles" (A9) did not require payment or justify permitting setoff or other relief for the present. It is clear from the text and headings of its opinion that the Reorganization Court first set out (under the heading "A. The Right of the Interline Railroads to Payment of Their Claims." (A7)) to determine if "equitable principles" (A7, 9) entitled the railroads to payment of their claims, and, following its holding that the railroads voluntarily extended credit to the Debtor (Penn Central)—on the ground that "self-help" measures were available to put Penn Central on a cash basis for all interline accounts (A9)—the Court concluded that the railroads are not presently entitled to payment of their claims. Then the Reorganization Court proceeded (under the heading "B. Control of the Exercise of the Right of Set-Off." (A9)) to determine not only whether it *could* enjoin setoffs but also whether it *should* enjoin the railroads from setting off. The Court enjoined setoff of per diem and other interline accounts primarily on the ground that *there was "substantial uncertainty that the interline railroads will be able to establish a distinction between their claims and the claims of the Debtor's trade creditors,* [and] it would not be appropriate to permit the interline railroads to resolve the question favorably to themselves through the self-help remedy of set-off prior to determination of the question in the proof of claims program." (Emphasis added) (A10). Neither the Reorganization Court nor the Court of Appeals (which affirmed as to all interline accounts except freight and passenger) appreciated the distinction between per diem and other interline accounts on the matter of "self-help."

The essence of Petitioners' position is that they had no lawful means of "self-help" by which to protect themselves against non-payment of their per diem balances; that they did not voluntarily extend credit to Penn Central; and that, for these and other reasons set forth in the petition (particularly the operation of Section 1(14)(a) of the Interstate Commerce Act), their per diem claims are clearly distinguishable, as a matter of law, from the claims of trade and other voluntary creditors. Accordingly, per diem claims are, as a matter of law, entitled to immediate payment. However, even if immediate payment is not required as a matter of law, but is held to be within the discretion of the Reorganization Court, the distinctive equities vested in per diem claims should entitle Petitioners, as unique involuntary creditors, to an order requiring payment or permitting setoff or other appropriate relief (including declaration of constructive trust) for such claims. As pointed out in the petition, since the opinion of the Reorganization Court was premised on the holding that credit was voluntarily extended for per diem, it is possible, and indeed likely, that the Reorganization Court would have ordered payment of per diem claims or permitted setoff or other appropriate relief, if that Court had found that self-help was not available for per diem and that there was no voluntary extension of credit.*

---

* Although the right of setoff does not automatically apply in reorganization proceedings, but may be enjoined "to save a sick business" (*Susquehanna Chemical Corp.* v. *Producers Bank & Trust Co.*, 174 F. 2d 783, 787 (3d Cir. 1949)), it does not follow that setoff will automatically be enjoined. Whether a setoff may properly be enjoined "depends upon the equities of the situation" (*Id.*, at 787). Thus, where setoffs would "frustrate the reorganization process" they have been enjoined. *Penn Central Transportation Company* v. *National City Bank of Cleveland, et al.*, 315 F. Supp. 1281, 1283 (E. D. Pa. 1970), *aff'd*, 453 F. 2d 520 (3d Cir. 1971), *cert. den.*, 408 U. S. 923 (1972). But, here, given the equities vested in per diem claims and the clear distinction between voluntary and involuntary creditors (and between per diem creditors and other involuntary creditors, if any) the Reorganization Court would not be justified in enjoining setoff for per diem on "discrimination" grounds or on the ground that such setoffs would frustrate reorganization. Any setoff means a reduction in the debtor's receivables

II

NEWLY CITED AUTHORITIES

As Respondents correctly point out (Resp. p. 7), Petitioners have acknowledged that they did not cite to either the Reorganization Court or the Court of Appeals the decisions and order of the Commission in *Rules for Car Hire Settlement*, 160 I. C. C. 369, 165 I. C. C. 495 (1930) or the decision of this Court in *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80 (1931). Of course, Petitioners regret that these obviously pertinent and controlling authorities for their position on per diem claims were discovered only shortly before the due date of the petition, well after the Court of Appeals denied petitions for rehearing. However, the argument that per diem claims are involuntary and do not reflect an ordinary debtor-creditor relationship, and that Petitioners are entitled to payment, setoff and other relief, was presented in the pleadings (Pet. pp. 8-9; Resp. p. 4) and was otherwise before the Reorganization Court and the Court of Appeals. Further there was fully presented to the Court of Appeals, on petition for rehearing, the argument (including criticism of

---

(but not in its current cash position), yet this is justified in appropriate cases on grounds of equity. Penn Central would be thus affected by setoff of per diem, but it cannot be said, nor did the Reorganization Court find, that such setoff would frustrate reorganization. The per diem amounts involved (while substantial for Petitioners) are minute (for Penn Central) compared to the staggering cash and non-cash requirements for Penn Central's successful reorganization, and this was known to be so on June 21, 1970. Although "changed circumstances" are not before this Court on this petition (*e.g.*, the *Regional Rail Reorganization Act of 1973*, Public Law 93-236, 93d Congress, approved Jan. 2, 1974, 87 Stat. 985), the Court may take judicial notice of the fact that permitting setoff or other relief, even for all railroad per diem claims (not only Petitioners'), would have no material adverse effect on Penn Central's reorganization or on its financial condition.

For other forms of possible relief for per diem claims see *In re New York, New Haven & Hartford Railroad Co.*, 330 F. Supp. 131 (1971), *rev'd on jurisdictional grounds*, 457 F. 2d 683 (2d Cir. 1972), in which Judge Anderson, on equitable grounds includ-

Southern Ry. Co. v. *Flournoy*, 301 F. 2d 847 (4th Cir. 1962) (Pet. p. 12) that the manner of *car hire settlement* is compelled by operation of the Interstate Commerce Act and practical necessity, so there is no lawful "self-help" for per diem and no voluntary extension of credit. Moreover, it is evident that Petitioners are relying on more than the newly cited authorities, for as stated at page 8 of the petition:

> ". . . there was no voluntary extension of credit to Penn Central. *Even without the Commission order,* Petitioners had no lawful means by which to protect themselves against non-payment of their per diem balances. They could not withhold their cars, and since any demand by them for cash settlement or security would be disregarded by Penn Central with impunity, there was nothing more they could have done (or could do now) to protect themselves against non-payment." (Emphasis added, footnotes deleted.)

It is worth noting that Respondents' only response to this is a paragraph on the "right of independent action" (Resp. p. 8) containing a conspicuously weak near-denial, namely, that it was not certain that there was any compulsion with respect to per diem. What is more telling, however, is Respondents' failure to comment on the error of the courts below on the issue of "self-help", as applied to per diem, and their failure to cite even one action which could have been taken by Petitioners to assure payment of per diem balances.

III

THE "RIGHT OF INDEPENDENT ACTION"

In citing the "right of independent action" (preserved under Sections 5(a)(2) and 5(a)(6) of the Interstate Commerce Act) to suggest that there may not have been any element of

---

ing unjust enrichment (p. 144), imposed an equitable lien on former New Haven properties transferred to Penn Central and declared a constructive trust on other such properties and on income therefrom; and *In re Penn Central Transportation Company*, 337 F. Supp. 779, 790 (1972), in which Judge Fullam imposed a "tentative lien" on the former New Haven properties, in favor of the New Haven Trustee.

compulsion (Resp. p. 8), Respondents entirely miss the point that there was no "independent action" which Petitioners could have taken to assure payment of their per diem balances. Moreover, Respondents obscure and misapprehend the clear distinction between cases involving disputes over the level of per diem (*i.e.*, what is the reasonable compensation required by Section 1(14)(a) of the Interstate Commerce Act?) and this case, involving no dispute over the level of per diem or the per diem amounts owed to Petitioners, but rather the issue whether (in the words of the Court of Appeals) there is "compulsion, statutory or otherwise, as to the manner by which [per diem] shall be paid." (A32) The railroads referred to by Respondents as having exercised the right of independent action (Resp. p. 8) did so only because they objected to the *level* of per diem determined pursuant to agreed AAR procedures, and not because they objected to, or could have disregarded, the practices and rules for car hire *settlement* prescribed in the AAR Code of Per Diem Rules and the order of the Commission in *Rules for Car Hire Settlement, supra.* In fact, even as these railroads litigated before the Commission and the courts the per diem level issue, they continued (or attempted) to report and settle car hire in accordance with the terms of the Commission order and the settlement rules of the AAR Code of Per Diem Rules. Such litigation included the arbitration cases cited by Respondents (Resp. pp. 5-6), which concerned attempts by car-owning railroads to set off *disputed* per diem amounts claimed to be due from car-using railroads, against undisputed freight balances owed to such car-using railroads. In the subject proceeding, however, there is no issue over the amount of Petitioners' per diem claims or Penn Central's obligation to pay; the issue is whether, because of the unique characteristics of per diem claims, the Reorganization Court must (or should) order payment now or permit setoff or other appropriate relief for such claims.

IV

OTHER RAILROAD REORGANIZATION PROCEEDINGS

It may be a fact, as Respondents assert (Resp. p. 11) that in other reorganization proceedings "the status of pre-bankruptcy interline per diem claims has been determined in classification of claims in a proof of claims program . . ." It is also a fact, which Respondents fail to state, that the arguments for immediate payment of per diem claims, setoff, declaration of constructive trust or other relief, asserted by Petitioners in the petition, were never raised or articulated in those other proceedings, but were first raised and argued before the courts in this proceeding. It is also worth noting that Respondents do not mention, let alone discuss, the operation of Section 1(14)(a) of the Interstate Commerce Act, upon which Petitioners' reasons for granting the petition are, in part, based; nor do Respondents comment on the unlimited financial risk a car-owning railroad is forced to assume if the decisions below are allowed to stand. Although it cannot refuse to permit use of its cars by other roads, before or during their reorganization, and cannot protect itself against their non-payments of per diem balances, it must suffer what may be a serious drain on working capital through a forced wait of many years (consider Penn Central's likely timetable!) before the status of its per diem claims is determined and payment, if any, is received. And compounding this inequity is the fact that, throughout the period of non-payment of per diem, the car-using railroad earns freight revenues through use of the car-owning railroad's cars.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

RICHARD M. FREEMAN,
ZEV STEIGER,
400 West Madison Street,
Chicago, Illinois 60606,
Attorneys for Petitioners, Chicago and North Western Transportation Company, Grand Trunk Western Railroad Company and St. Louis-San Francisco Railway Company.